



White Collar, Government & Internal Investigations ADVISORY ■

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No More “All or Nothing” – DOJ Softens the Yates Memo

The U.S. Department of Justice (DOJ) has revised the Justice Manual—formerly the United States Attorneys’ Manual—changing the DOJ’s policies for assessing individual accountability in corporate criminal and civil enforcement matters. The changes return discretion to DOJ attorneys in negotiating corporate resolutions and address problems that arose under the 2015 Yates Memo.

Cooperation credit no longer requires a company to identify everyone allegedly involved in the misconduct.

Under the DOJ’s previous policy—memorialized in the [Yates Memo](#)—a company was not eligible for cooperation credit unless it identified everyone (from the lowest to the highest ranks) involved in the alleged misconduct. That policy proved unworkable in practice, so prosecutors and defense counsel began focusing on those substantially involved in the alleged misconduct (as opposed to everyone involved). The revisions to the Justice Manual bring DOJ policy in line with the practice on the ground: Under the new policy, cooperation credit in the criminal context turns on identifying those who were “substantially” involved in or responsible for the alleged misconduct. That change in policy will eliminate much of the uncertainty that has plagued corporate settlements under the Yates Memo.

The policy changes carry over (with some differences) to the civil side. The revised civil policy permits full cooperation credit when a company identifies every individual who was “substantially” involved in or responsible for the alleged misconduct but still permits partial cooperation credit when a company identifies all alleged wrongdoing by senior officials. That is a welcome change: Although a company still must disclose misconduct by key personnel to receive at least partial credit, companies no longer have to boil the ocean to uncover potential misconduct by every employee (no matter how peripheral their relationship to the issues). The revised policy should also reduce the risk that disagreements over whether a particular employee is culpable will derail settlement discussions.

DOJ lawyers resolving an investigation against a company may not immunize individuals from criminal liability, but they have discretion in the civil context.

For years now, the DOJ has resolved investigations against companies while leaving open the possibility that the DOJ may prosecute the individuals responsible for the underlying conduct. The revised Justice Manual memorializes that approach. Under the revised policy, a prosecutor may not immunize responsible individuals from criminal liability absent "extraordinary circumstances."

The revised policy is different on the civil side: In negotiating corporate civil settlements, DOJ lawyers may include releases for individuals.

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The DOJ remains committed to prosecuting the most culpable individuals for their misconduct. Under the revised policies, individual wrongdoers do not get a free pass, but low-level employees with tangential involvement are less likely to get caught up in the investigation. In all events, the policy changes should benefit corporations cooperating with DOJ investigations, giving them tools to narrow the scope of investigations and otherwise to negotiate for more favorable resolutions.

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